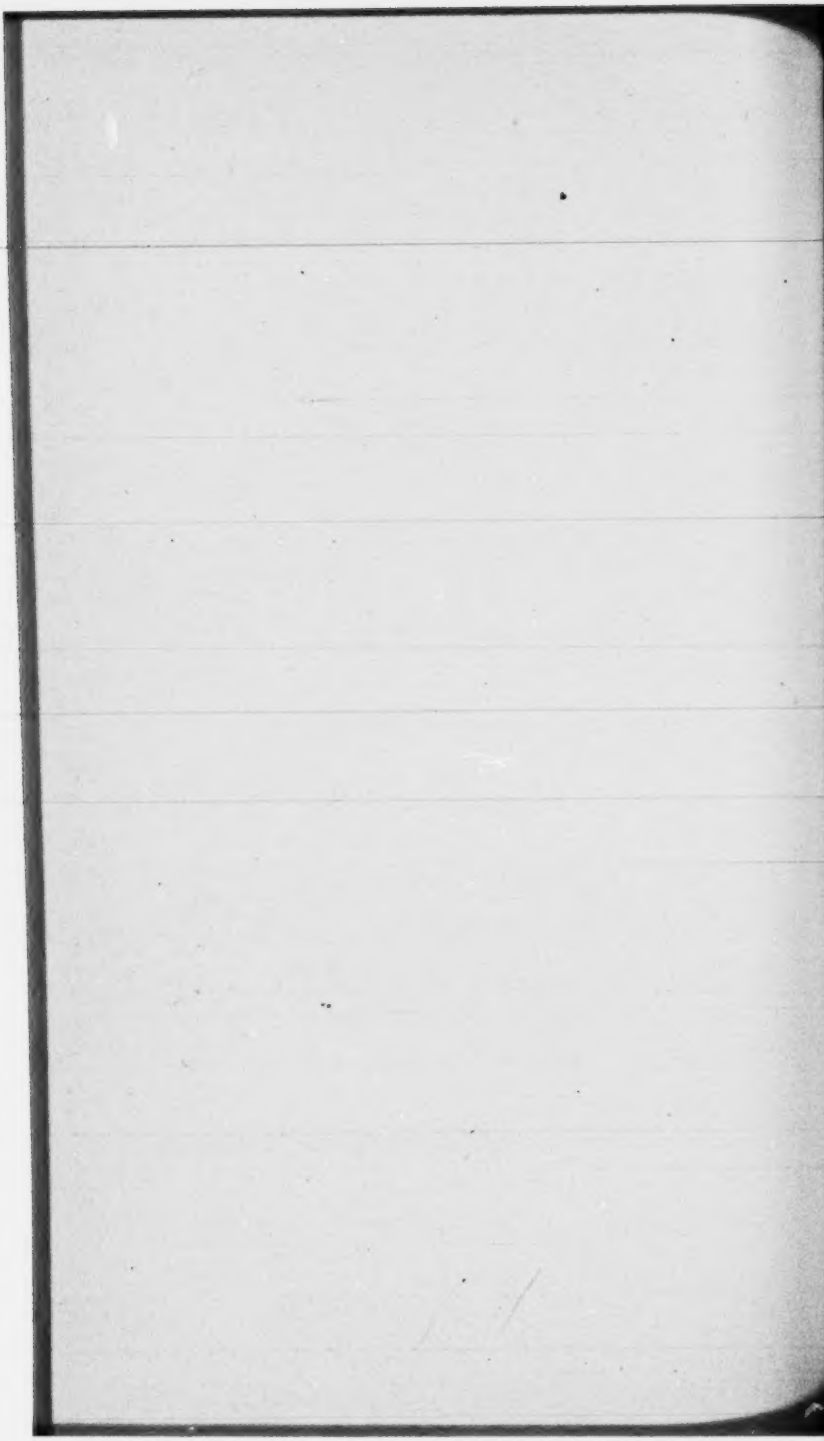


Office Supreme Court
FILED
AUG 13 1900
JAMES H. McKENNEY,
Clerk

No. 7 Orig.

Brief of Shepard & Hutchings for Petitioner

# SUPREME COURT OF THE UNITED STATES

Filed Aug. 13, 1900.

**OCTOBER TERM, 1899.**

*No. 7.*
*(Original.)*

---

*Ex-parte* ORANGE FULLER,
Assignee of MANNY G. BUTLER and ROBERT E. BUTLER,
Composing the Firm of BUTLER BROTHERS,
*Petitioner.*

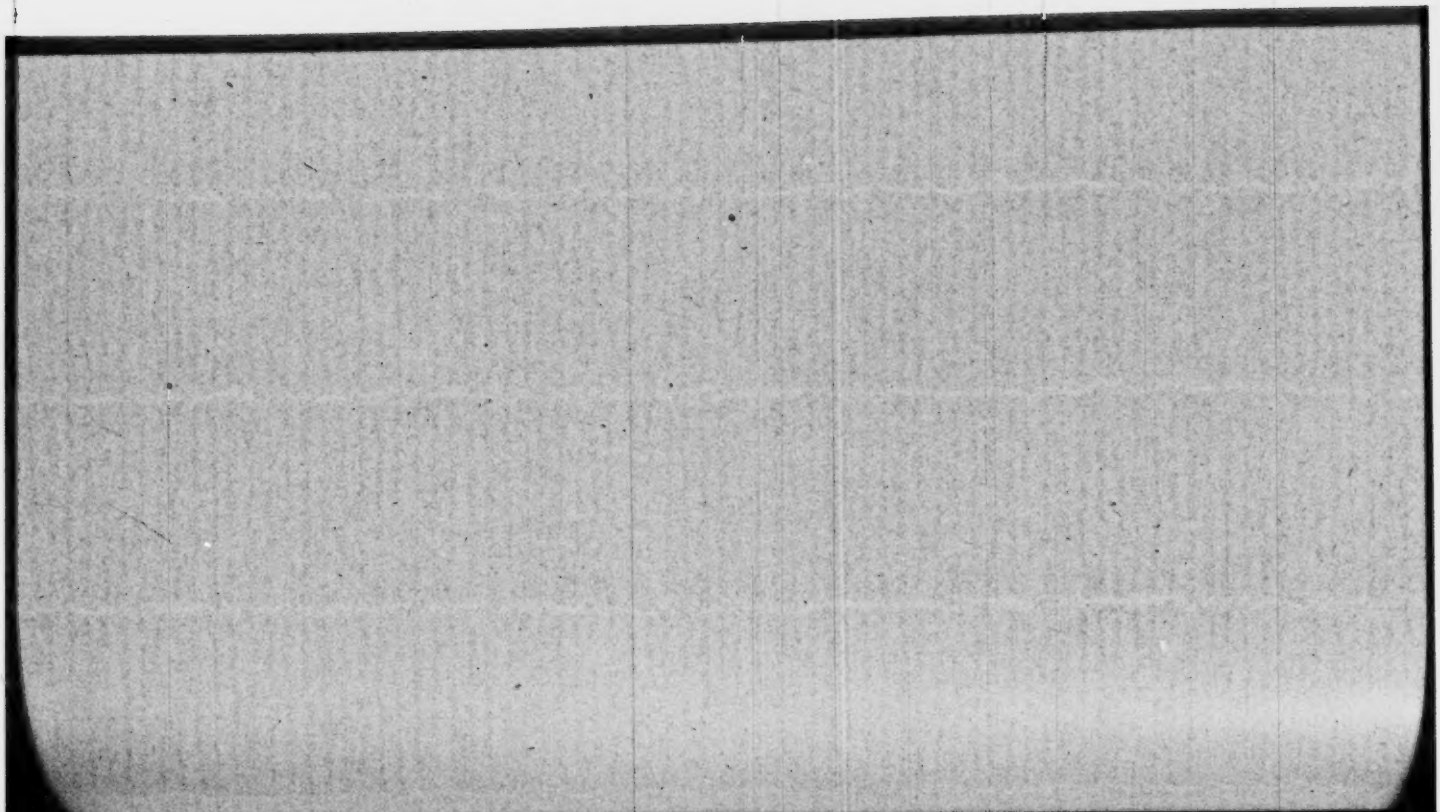
---

*Brief on Behalf of Petitioner to Sustain His Demurrer Return of Hon. Wm. H. H. Clayton.*

---

RICHARD B. SHEPARD,
HARRISON O. SHEPARD,
WILLIAM T. HUTCHINGS,
*Attorneys for Petitioner.*

Muskogee Evening Times Print.



# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1899.

*Ex-parte* ORANGE FULLER,
Assignee of MANNY G. BUTLER and ROBERT E. BUTLER,
Composing the Firm of BUTLER BROTHERS,
*Petitioner.*

*No. 7.*
*(Original.)*

## STATEMENT OF CASE AND BRIEF OF ARGUMENT FOR PETITIONER.

### STATEMENT.

This was an original action, brought by petitioner as assignee of Butler Brothers, to procure the issuance of a writ for mandamus directed to the honorable W. H. H. Clayton, as Judge of the United States Court in the Indian Territory, and Central District thereof, commanding said Judge to execute the mandate of this honorable Court, and to set aside an order made on the fifteenth day of January, A.D. 1900, wherein a new trial was granted on behalf of the defendant, said cause being styled Orange Fuller, assignee, plaintiff below (defendant in error in this Court), and The Missouri,

Kansas & Texas Railway Company, defendant below (plaintiff in error in this Court), said cause in this Court bearing number 16,236.

The facts in the case are as follows:

On the twenty-third day of January, 1892, your petitioner herein, as assignee for Butler Brothers, instituted an action in the United States Court in the Indian Territory, sitting at Muskogee, against The Missouri, Kansas & Texas Railway Company to recover damages alleged to have occurred by reason of a fire negligently set out by said company, which destroyed the property of Butler Brothers in Chouteau, Indian Territory.

Afterwards, and about the first day of May, 1894, the venue of said cause was properly changed to the second judicial division of the Indian Territory, now the Central District.

The cause was tried to a jury and on the second day of February, 1895, a judgment on the verdict of the jury was entered in favor of the petitioner and against The Missouri, Kansas & Texas Railway Company for eight thousand, five hundred ($8,500.00) dollars.

Exceptions were taken, an assignment of errors filed, a supersedeas bond executed and approved, and the cause properly and regularly removed by writ of error into the United States Circuit Court of Appeals, Eighth circuit, the record having been filed in that Court on the third day of April, 1895.

On the thirteenth day of December, A.D. 1895, after said cause had been submitted on oral and printed arguments, an opinion of the United States Circuit Court of Appeals was filed affirming the judgment of the lower Court, and judgment was in said United States Circuit Court of Appeals entered accordingly. *(72 Fed. Rep., 467.)*

Exceptions to said judgment were taken, and assignments of error filed, a supersedeas bond executed and approved, and

the cause properly and regularly removed by writ of error into this Court, the record being filed in this Court on the twentieth day of March, A.D. 1896, which constituted case numbered 16,236.

Afterwards on the third day day of January, A.D. 1898, the said judgment of the United States Court of Appeals, Eighth circuit, and the United States Court in the Indian Territory, was affirmed by this honorable Court. *(168 U. S., 707.)*

Afterwards about the third day of March, A.D. 1898, the mandate of this Court was issued, and on the twenty-second day of July, 1898, was filed and spread of record in the United States Court in the Indian Territory, Central District.

After the removal of said cause to the United States Circuit Court of Appeals, Eighth circuit, and to this Court by writs of error, and while the same was pending in this Court, defendant below (plaintiff in error in this Court) on the twentieth day of April, A.D. 1896, and without leave of this honorable Court first had and obtained, and without dismissing his writ of error here, filed in the United States Court in the Indian Territory, Central District, its petition for a rehearing upon newly discovered evidence, and subsequently filed amendments thereto as follows, to-wit:

May seventh, 1897, first amended petition for new trial.

August thirteenth, 1897, second amended petition for new trial.

September twenty-first, 1897, third amended petition for new trial.

May twentieth, 1898, fourth amended petition for new trial.

June twenty-seventh, 1898, amendment to fourth amended petition for new trial.

August thirtieth, 1898, second amendment to fourth amended petition for new trial.

To all of which petitioner filed answer and objected to the consideration of said petition and amendments thereto on the ground that the United States Court in the Indian Territory was without jurisdiction or authority in the premises, and that the issue sought to be made by the newly discovered evidence was not properly before said Court, and that the proceedings were, and had been irregular, and not according to law.

On the fifteenth day of January, 1900, and after the mandate of this Court had been filed and spread of record in lower Court, and without leave of this Court. the said W. H. H. Clayton, as Judge of said Court, sustained said petition, and accordingly on that date entered an order upon the records of said United States Court in the Indian Territory, granting a new trial in the said cause.

The petition for a new trial presented by The Missouri, Kansas and Texas Railway Company was filed and granted under Sec. 5155 Mansfield's Digest of the Statutes of Arkansas, adopted by act of Congress, and in force as far as applicable in the Indian Territory, which is as follows:

"Sec. 5155. Where grounds for new trial are discovered after the term at which the verdict or decision was rendered, the application may be made by petition filed with the Clerk not later than the second term after the discovery, on which a summons shall issue, as on other complaints, requiring the adverse party to appear and answer it on or before the first day of the next term. The application shall stand for hearing at the term to which the summons is returned executed, and shall be summarily decided by the Court. The evidence may either be by depositions or by witnesses examined in Court. But no such application shall be made more than three years after the final judgment was rendered."

The motion of petitioner for leave to file his petition for writ of mandamus was sustained by this Court and an order was directed to the Honorable W. H. H. Clayton, as Judge of the United States Court for the Central District of the Indian Territory, on March 26th, 1900, to show cause why a

writ of mandamus should not issue against him, commanding him to execute the mandate of the Court issued as above set forth. The return of said Judge to the rule issued as aforesaid has been duly filed, to which the petitioner has filed his demurrer.

## ASSIGNMENTS OF ERROR.

The Court below erred,

First, in considering and determining the petition for a new trial while said cause was pending in this Court.

Second, in considering and determining the petition for a new trial when no leave to file a bill of review, or any other kind of petition, had been obtained from this Court.

Third, because the return of the Judge of the Central District of the United States is insufficient in law to show any reason why a writ of mandamus should not issue against him commanding him to execute the mandate of this Court.

## ARGUMENT.

In discussing the legal questions involved in this case it is well in the outset to distinguish between the practice in common law causes and that prevailing in equity causes. Had this been a suit in equity and the defendant below had followed the ordinary practice in such cases and filed his bill of review, setting up proper new matter for a new hearing, it would still have been in the position that it is now, for the bill of review could not be entertained unless leave to file the same had been obtained from this Court, in which the case was then pending.

*In re Potts*, 168 U. S., 293.

*Railway vs. Litchfield*, 68 U. S., 69-73.

*In re Washington & Georgetown Ry.*, 140 U. S., 91.

*Durant vs. Storrow*, 101 U. S., 555-557.

The reply might be, however, that under such a practice it would still not be too late to ask permission of this Court to permit the filing of such a bill in the lower Court. A bill of review, however, can be filed only to reverse or modify a decree in chancery and not for the purpose of obtaining new trial in suits at law for after-discovered testimony, especially when no fraud was practiced by the successful party.

2 *Beach on Modern Eq. Prac.*, Sec. 852.

1 *Foster Fed. Prac.*, Sec. 354.

Where, as in this case, the point was well known to the attorney, the permission is always obtained at the final hear-

ing and the proper practice is to insert it in the decree and mandate issued by the Appellate Court.

*Watson vs. Stevens, 53 Fed., 31.*

The remedy provided by Mansfield's Digest, Section 5155, and a part of the pleading and practice act in force in this Territory is exclusive in suits at law. We are bound by the construction put by the Supreme Court of Arkansas upon that statute before it was put in force in this jurisdiction.

*Sanger vs. Flow, 1 C. C. A., 56, 48 Fed., 152.*

*Appllos vs. Brady, 49 Fed., 401.*

*McClellan vs. Pyeatt, 50 Fed., 686.*

*Rainwater Hat Co. vs. Malcolm, 51 Fed., 734.*

*Hogg vs. Emerson, 6 How., 483.*

*Stutsman Co. vs. Wallace, 142 U. S., 295.*

The Supreme Court of Arkansas, in *Jacks vs. Adair, 33 Ark., 166*, establishes the practice which should have been pursued by the defendant in the Court below, or the plaintiff in error in the Supreme Court, and that is that it had the option to dismiss his writ of error in this Court and rely upon his petition to get a new trial, or pursue to the bitter end his effort to obtain a reversal of the judgment on the case made below. That that remedy is exclusive in cases of common law is further shown by Chapter 38 of Mansfield's Digest of the laws of Arkansas, a chapter also put in force in this jurisdiction. Section 3904 shows that such final orders may be reversed, vacated or modified, either by an Appellate Court or by the Court in which the judgment was rendered in the method pointed out in Section 3909.

*Johnson vs. Campbell, 52 Ark., 316.*

Whatever, therefore, may be the practice and statutes of the various States of the Union the decision of the Arkansas courts in construing our statutes and of this, the Supreme Court of the United States, have positively and unequivocally

settled the practice in such cases in this jurisdiction, and that is that in actions at law the plaintiff in error must dismiss his appeal before he can proceed under Section 5155, and in suits in equity he must first get leave from the Appellate Court for permission to file his bill of review. Under the Federal practice the docketing of the case in the Appellate Court removes it from all control or supervision on the part of the Court below.

*Citizens Bank of Wichita vs. Farwell, 6 C. C. A., 30.*

*Aspen Mining & Smelting Co. vs. Billings, 150 U. S., 35.*

*Kimberly vs. Arms, 40 Fed., 548.*

Respondent, in his return to the rule in this cause, has quoted at length from the decision and evidence in another case arising out of the same circumstances as this one and in which the railroad company used the testimony which was set up in the petition in this case for a new trial. Additional testimony, which, in the mind of the Judge, might be sufficient to weigh against one party or the other, might be entirely insufficient to support a petition for a new trial or a bill of review for the same. The new evidence brought in was largely cumulative, and to a very large degree intended to impair the credibility of former witnesses in the trial in this cause. Now such testimony in the mind of the Court of Appeals might seem sufficient to turn the scale against the plaintiff, but the courts all agree that as newly discovered evidence it is insufficient to warrant a new trial, whether sought by bill of review or otherwise.

*Southard vs. Russell, 16 How., 549.*

The proceedings taken by the railway company to obtain a new trial in this cause were without warrant of law and the Court entertaining them was acting without jurisdiction. The limitation of three years since the discovery of the new testi-

mony has fully run and no new petition could now be filed The Judge bases his actions exclusively upon Section 5155 of Mansfield's Digest. As we think we have shown, this gave him no warrant whatever for his actions, and this Court cannot do otherwise than compel him to enforce its mandate and issue an execution thereon against the defendant railroad and its bondsmen for the full amount of our judgment, interest and costs.

We ask that in passing upon this matter the Court take into consideration the brief formerly filed by us to sustain the motion for a rule against the Judge of the United States Court in the Indian Territory, and Central District thereof, and upon which said rule was granted.

Respectfully submitted,

RICHARD B. SHEPARD,
HARRISON O. SHEPARD,
WILLIAM T. HUTCHINGS,
*Attorneys for Petitioner.*

No. 7 Orig.

FILED
MAY 14 1900
JAMES H. McKENNEY,
Clerk.

# Supreme Court of the United States.

No. 7.
Original O. T. 1900.

EX PARTE ORANGE FULLER, AS ASSIGNEE OF MANNY G. BUTLER AND ROBERT E. BUTLER, COMPOSING THE FIRM OF BUTLER BROTHERS, PETITIONER.

Return of Respondent, Judge William H. H. Clayton, to rule to show cause why Writ of Mandamus should not be issued.

JAMES HAGERMAN,
CLIFFORD L. JACKSON,
JOSEPH H. BEYSON,
*Counsel for Respondent.*

Hudson-Kimberly Publishing Co., 310 Pine St., St. Louis.

# Supreme Court of the United States.

No. 7.

Original O. T. 1900.

EX PARTE ORANGE FULLER, AS ASSIGNEE OF MANNY G. BUTLER AND ROBERT E. BUTLER, COMPOSING THE FIRM OF BUTLER BROTHERS, PETITIONER.

**Return of Respondent, Judge William H. H. Clayton, to rule to show cause why Writ of Mandamus should not be issued.**

Now at this day comes William H. H. Clayton, as Judge of the United States Court for the Central Judicial District of the Indian Territory, and for return to the rule of this court upon him entered on March 26th, 1900, to show cause why a writ of mandamus should not issue against him commanding him to execute the mandate of this Honorable

Court issued out of the office of the clerk of this Honorable Court on the 10th day of June, 1898, and which was upon the 22nd day of July, 1898, filed and spread upon the records of the said District Court, now presided over by the said respondent as Judge, and commanding said respondent to set aside the order made by said District Court, so presided over by said respondent, on the 15th day of January, 1900, granting a new trial in the case of Orange Fuller, as Assignee of Butler Brothers v. The Missouri, Kansas and Texas Railway Company, respectfully states:—

That in making the order granting a new trial in the said case of Orange Fuller, as Assignee of Butler Brothers v. The Missouri, Kansas and Texas Railway Company, said respondent intended no disobedience of nor disregard to the mandate of this Honorable Court but proceeded under what said respondent deemed to be his imperative duty as such Judge under Section 5155 of Mansfield's Digest of the Statutes of Arkansas which was extended over and put in force in the Indian Territory by virtue of an Act of Congress, entitled "An Act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes," approved May 2, 1890, and which said Section 5155 is as follows:—

"Sec. 5155. Where grounds for new trial are "discovered after the term at which the verdict

"or decision was rendered, the application may "be made by petition filed with the clerk not "later than the second term after the discovery, "on which a summons shall issue, as on other "complaints, requiring the adverse party to ap- "pear and answer it on or before the first day "of the next term. The application shall stand "for hearing at the term to which the summons "is returned executed, and shall be summarily "decided by the court. The evidence may "either be by depositions or by witnesses ex- "amined in court. But no such application "shall be made more than three years after the "final judgment was rendered."

The said respondent was also acting under the precedent established by a court superior to said District Court, to wit, The United States Court of Appeals for the Indian Territory, in its opinion in a companion case to the Orange Fuller case, to wit, the case of William L. Wilder v. The Missouri, Kansas and Texas Railway Company, which said opinion is found on pages 490 to 496, inclusive, 53 Southwestern Reporter, a part of which opionion is as follows:—

"We have examined the voluminous record "in this case with close attention, as well as the "briefs and arguments of counsel, and at the "outset are constrained to say that there is very "great doubt in our opinion as to the origin of "the fire. It appears that this case was tried

" before a jury, and resulted in a mistrial, by " failure of the jury to agree. It was tried " again, and withdrawn by reason of the sickness " of a juror, and on this the third trial a verdict " was for plaintiff (the appellee here). It also " appears that several other suits have been in- " stituted growing out of that fire, against the " railway company, the appellant here. One of " them (Fuller v. Railroad Co.) was appealed by " the railroad company to the Circuit Court of " Appeals (18 C. C. A. 641, 72 Fed. 467), and " thence to the United States Supreme Court (18 " Sup. Ct. 944), where the case was affirmed " against the railroad company by a divided " court, four of the judges being in favor of the " affirmance of the case, and four against (the " court being equally divided); but it also ap- " pears that the case at bar had much more evi- " dence in behalf of the defendant than did the " Fuller case, and counsel for appellant con- " fidently asserts that, had the facts in the case " at bar been in the record of the Fuller case, " reversal would have followed, without question. " Counsel for appellant therefore insists that the " trial court should have sustained his motion to " direct the jury to return a verdict for the " defendant.

" The appellant introduced, as appears from " the record, about thirty more witnesses on the " trial of the case at bar than were introduced " by it on the trial of the Fuller case, and much " of this testimony related to the direction the

" wind was blowing at the time the fire occurred. " This was one of the most material questions " presented to the jury. The appellee had six " witnesses that testified that the direction of the " wind was from the southeast, and the appel- " lant had sixteen witnesses that the wind was " from the south, and on that point twelve more " than in the Fuller case. The wind had to be " from the southeast to carry the smoke from " the engine to the barn, as the barn was 300 " feet west of the main track, and the measure- " ment showed that from the point where the " engine was located by appellee's witnesses to " the southeast corner of his barn was 359 feet, " and appellee's witnesses say the wind was " strong from the southeast. If such were the " case, it would necessarily carry the fire from " the barn in a northwesterly direction; and " here develops a physical fact of very great " significance. The fire from the barn extended " and destroyed the property north of the barn, " and not northwest from the barn. The resi- " dence of John D. Moore was 661 feet from the " main track of the Missouri, Kansas & Texas " Railroad, and was located 4,260 feet from the " barn. Hence in a short time the fire had extended " on a line due north, and parallel to the main " track of the Missouri, Kansas and Texas " road, which ran north, 10 degrees east, and " had only varied in that distance of 4,260 " feet the difference between 300 feet and 661 " feet, while, if the witnesses of the appellee are

"correct, the wind had carried the smoke to the "barn, 300 feet from the main track, in a dis- "tance from the engine to the barn of 359 feet. "The physical facts sustain the testimony of "the appellant's witnesses, and not the wit- "nesses of the appellee. Other evidence was "introduced by appellant tending to show that "the barn was frequented by people who drank "whisky and smoked pipes and cigars; that a "small room was on the upper floor of the barn, "which was used for that purpose, and that im- "mediately preceding the fire Dole Baugh took "his horse out of the stable, and started east "across the railroad track, met Homesley and "Springston, and was talking to them; that he "was smoking a cigar at the time, and was ap- "parently under the influence of liquor; that, "a very few moments after his leaving the barn, "it was seen to be on fire, and Homesley and "Springston called Baugh's attention to the "fire; that Baugh stated to a number of wit- "nesses that he was sorry, and knew Wilder "would blame him; that the fire was started in "the barn, just about where he got his horse; "that he went in the barn, smoking, to get his "horse, and had not been out over fifteen min- "utes when the fire was discovered. A number "of witnesses testified to the statement that it "was frequently mentioned in the town, while the "fire was burning, that Baugh had set the barn "on fire. Baugh, in rebuttal, denies these state- "ments, but the number of unimpeached wit-

"nesses testifying to the statements makes his "evidence of little value. Evidence was also "given that during the fire Wilder, the appellee, "accused Baugh of starting the fire. It was "also shown that Baugh was the stepson-in-law "of Wilder, and it is also shown by evidence "that Baugh was the one who developed the "theory that the engine of the appellant "started the fire, and he went to the telegraph "agent and stated that he was accused of set- "ting fire to the barn, and wanted the number "of the engine that hauled the stock train that "afternoon. Mose Alberty, witness for appel- "lee, testified that the fire burned two oat "stacks over 700 feet due north of the barn, "and that the fire burned all buildings "due north of the barn, and did not "burn two haystacks less that 300 feet "northwest of the barn, nor did the fire burn "stores to the west of it, or Mrs. Grant's "hotel, to the northwest of it; and he, with "William Calvert and Francis Eller, all wit- "nesses for appellee, testified they first dis- "covered smoke and heat coming out from the "east door of the barn, while appellee claims "that the fire first appeared in the upper story "on the southeast corner, where hay was stored "in the barn, and where his witnesses testify the "smoke from the engine struck the barn. The "appellee's witnesses testify that smoke came "out of the engine and the wind drove the "smoke to the southeast corner of the barn,

"but none of them testify that sparks or fire "were emitted from the engine; and the jury, "by their verdict, must have presumed that the "smoke carried sparks of fire. There was no "positive testimony to that effect.

* * * * * * * * * *

"We do not believe, under the proof in this "case, that the appellee is entitled to recover."

Respondent would further respectfully show that in view of this opinion in the said Wilder case all of the companion cases for damages growing out of the same fire have been voluntarily dismissed by the respective plaintiffs under stipulations providing that each party shall pay their own costs, and that the plaintiffs shall abandon all claims for damages, copies of which stipulations and orders of dismissal are hereto attached and marked "Exhibit A," "Exhibit B," "Exhibit C," "Exhibit D," "Exhibit E," "Exhibit F," and "Exhibit G," respectively, and made a part of this return.

Respondent would further respectfully show that the order of court granting a new trial in the said Orange Fuller case is in words and figures as follows: —

"Now at this day comes the above named "defendant, and in support of the fourth "amended petition for a new trial in this case "files certified copy of opinion of the United "States Court of Appeals for the Indian Ter- "ritory, in the case of Missouri, Kansas &

"Texas Railway Company, Appellant, versus "William L. Wilder, Appellee, and the "Court having fully considered the said "amended petition for a new trial in this "case, which was heretofore continued by "agreement between counsel to this the "December, 1899, term of this court, "together with the evidence thereon, and the "briefs of counsel filed both in support of and "in opposition to said amended petition for new "trial, and the court having been fully advised "in the premises finds that the original petition "for new trial was filed on the twentieth day "of April, 1896, in accordance with Section "5155 of Manfield's Digest of the Statutes of "Arkansas, extended over the Indian Territory "by Act of Congress, May 2d, 1890, and that "summons was duly issued and served upon "the plaintiff as required by said statute, "and that the said plaintiff has duly "entered his appearance in these proceed-"ings, and filed answer to the original petition "for new trial, as well as to the different "amendments thereto, as such amendments "have been based upon such additional evidence "as the defendant alleges was discovered sub-"sequent to the filing of the original petition "for new trial and amended petitions for new "trial respectively, and the court further finds "that the evidence fully sustains the said peti-"tion for new trial and that under the statute "hereinabove referred to, and in view of the

"opinion of the United States Court of Ap-
"peals for the Indian Territory in the case of
"the Missouri, Kansas and Texas Railway
"Company, Appellant, v. William L. Wilder,
"Appellee, a companion case to this, that said
"petition should be sustained.

"Wherefore the court orders that the said pe-
"tition be sustained and a new trial be granted."

A certified copy of which order is hereto attached and marked "Exhibit H," and made a part of this return.

Respondent would respectfully further show that it fully appeared upon the hearing of the petition for new trial in the said Orange Fuller case that the defendant railway company had used all possible diligence to discover the actual origin of the fire upon which that suit was founded prior to the time of the trial of that case, and that it was to a large extent prevented from so doing by the strong influence which the plaintiffs in said case exerted over the minds of the people in the community where the fire occurred; and also by the actions of one of the plaintiffs whom it is shown urged several of the witnesses to conceal what information they had with reference to the origin of the fire, and that after the trial of the Orange Fuller case in the District Court the said railway company continued its efforts to discover the real origin of the fire, and as the result of its efforts it produced reliable new witnesses who proved by newly discovered and strong circumstantial evidence

that the fire was set out through accident by one Dole Baugh, and also proved by the admission of the said Dole Baugh, made while the fire was burning, that he had so set it out, and it was this evidence which largely induced the United States Court of Appeals for the Indian Territory to render the opinion of reversal heretofore cited in the said Wilder case as well as induce the plaintiffs in the companion cases to dismiss their cases, and that not only the Judges of the District Court and the United States Court of Appeals for the Indian Territory, but the plaintiffs in the above suits, became satisfied that these suits were all matters of great injustice and wrong, and satisfied this respondent that the original judgment in the Orange Fuller case was also a great injustice and wrongfully obtained and had the actual truth been fully known and not purposely concealed that the judgment in the Orange Fuller case would not have been affirmed by the United States Circuit Court of Appeals for the Eighth Circuit or this Honorable Court, and your respondent further realized that a greater injustice and wrong would be done by permitting the plaintiffs in this said Orange Fuller case to recover when the truth had been suppressed, and when all other plaintiffs were prevented from recovering because of the fact that the whole truth had come to light.

Your respondent further respectfully shows that he has at no time been disposed to disregard the mandate of this Honorable Court in this Orange Fuller case, but by reason of the great hardships of

the judgment in the said Orange Fuller case, and by the peculiar statute extended over the Indian Territory covering the procedure in this case, which in fact is really not a motion for a new trial, but an independent statutory action, unlike the statutes prevailing in any other jurisdiction of the United States save in the District of Columbia relating to the Court of Claims (see Ex Parte U. S., 16 Wallace, 699, and Ex Parte Russell, 13 Wallace, 664) and in the State of New York (see Henry v. Allen, 41 Northeastern Reporter, 694, and in the State of Iowa, Cook v. Smith, 12 N. W. 617, and in California, Naglee v. Spencer, 60 Cal. 10), where it has been held that notwithstanding an appeal to a higher court, or a mandate from a higher court that new trials must be granted in such cases as the one at bar, your respondent felt constrained without intending any discourtesy to this Honorable Court, or any disregard or discourtesy to its mandate to enter the order complained of in this case, and which order your respondent is perfectly willing to set aside should it seem meet and proper to this Honorable Court that such should be done.

WM. H. H. CLAYTON,
As Judge of the United States Court for the Central Judicial District of the Indian Territory.

Respondent.

JAMES HAGERMAN,
C. L. JACKSON,
JOSEPH M. BRYSON,
Counsel for Respondent.

## EXHIBIT A.

### TRANSCRIPT OF PROCEEDINGS.

The United States of America,
United States Court, Indian Territory,
Central District. } ss.

At a stated term of the United States Court in the Indian Territory, Central District, begun and had in the court rooms, at South McAlester in the Indian Territory, on the seventh day of May, being the first Monday of that month, in the year of our Lord one thousand nine hundred, and of the independence of the United States of America the one hundred and twenty-third.

Present: The Hon. Wm. H. H. Clayton, Judge of said court.

On Monday, the seventh day of May, 1900, among the proceedings had were the following, to wit:—

E. Ferrell,
Plaintiff,

No. 2066. vs.

The Missouri, Kansas & Texas Railway Company,
Defendant.

Now at this day comes the parties to the above

entitled and numbered cause and file stipulation showing that the said case is finally settled, plaintiff waiving and abandoning all claims for damages, and each of the parties agreeing to pay its own court costs.

It is therefore adjudged that this case shall be dismissed, and that the parties plaintiff as well as defendant shall each pay the court costs incurred by them in the prosecution and defense of this case respectively.

The United States of America,
United States Court, Indian Territory,
Central District. } ss.

I, E. J. Fannin, Clerk of the United States Court, within and for the Central District of the Indian Territory aforesaid, do hereby certify that the foregoing order is truly taken, and correctly copied from Court Journal 9, page , of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at South McAlester, this 7th day of May, A. D. 1900.

E. J. FANNIN, Clerk.

## EXHIBIT B.

IN THE UNITED STATES COURT IN THE INDIAN TERRITORY AT SOUTH M'ALESTER IN THE CENTRAL DISTRICT.

| | |
|---|---|
| E. Ferrell, Plaintiff, | |
| No. 2066. vs. | Stipulation for Settlement. |
| Missouri, Kansas & Texas Railway Company, Defendant. | |

It is hereby stipulated and agreed by and between the parties to the above entitled and numbered cause that the said cause together with all matters involved therein by and hereby are fully and finally settled, and that this cause shall be at once finally dismissed, each party to pay its own costs. The plaintiff waiving any and all claims for damages sued upon in this cause.

WILLIAM T. HUTCHINGS,
Atty. for Plaintiff.

CLIFFORD L. JACKSON,
Atty. for Defendant.

Indorsed No. 2066. In the United States Court at South McAlester, Indian Territory, E. Ferrell v. M. K. & T. Ry. Co. Stipulation for Settlement,

filed in open court May 7th, 1900, E. J. Fannin, U. S. Clerk.

I hereby certify that the within is a true and correct copy of the original and indorsements, thereon.

Witness my hand and seal of office this 7th day of May, 1900.

E. J. FANNIN, Clerk.

## EXHIBIT C.

### TRANSCRIPT OF PROCEEDINGS.

The United States of America,
United States Court, Indian Territory,
Central District. } ss.

At a stated term of the United States Court in the Indian Territory, Central District, begun and had in the court rooms, at South McAlester in the Indian Territory, on the seventh day of May, being the first Monday of that month, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-third.

Present, the Hon. Wm. H. H. Clayton, Judge of said Court.

On Monday, the seventh day of May, 1900, among the proceedings had were the following, to wit: —

William Ehler, Plaintiff,

No. 2067. vs.

The Missouri, Kansas and Texas Railway Company, Defendant.

Now at this day come the parties to the above entitled and numbered cause and file stipulation showing that the case is finally settled, plaintiff waiving and abandoning all claims to damages, and each of the parties agreeing to pay its own court costs.

It is therefore adjudged that this case shall be dismissed, and that the parties plaintiff as well as defendant shall each pay the court costs incurred by them in the prosecution and defense of this case, respectively.

The United States of America,
United States Court, Indian Territory,
Central District. } ss.

I, E. J. Fannin, Clerk of the United States Court, within and for the Central District of the Indian Territory aforesaid, do hereby certify that the foregoing order is truly taken, and correctly copied from Court Journal 9, page , of said Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at South McAlester this 7th day of May, A. D. 1900.

E. J. FANNIN, Clerk.

## EXHIBIT D.

IN THE UNITED STATES COURT IN THE INDIAN TERRITORY AT SOUTH M'ALESTER IN THE CENTRAL DISTRICT.

William Ehler, Plaintiff,

No. 2067. vs. Stipulation for Settlement.

Missouri, Kansas & Texas Railway Company, Defendant.

It is hereby stipulated and agreed by and between the parties to the above entitled and numbered cause that the said cause together with all matters involved therein and hereby are fully and finally settled, and that this cause shall be at once finally dismissed, each party to pay its own costs. The plaintiff waiving any and all claims for damages sued upon in this cause.

WILLIAM T. HUTCHINGS,
Atty. for Plaintiff.

CLIFFORD L. JACKSON,
Atty. for Defendant.

Indorsed: No. 2067. In the United States Court at South McAlester, Indian Territory. William Ehler v. M. K. & T. Ry. Co. Stipulation for

settlement, filed in open court, May 7th, 1900, E. J. Fannin, U. S. Clerk.

I hereby certify that the within is a true and correct copy of the original and indorsements thereon filed in this cause.

Witness my hand and seal of office this 7th day of May, 1900.

E. J. FANNIN, Clerk.

## EXHIBIT E.

### TRANSCRIPT OF PROCEEDINGS.

The United States of America,
United States Court, Indian Territory, } ss.
Central District.

At a stated term of the United States Court in the Indian Territory, Central District, begun and had in the court rooms, at South McAlester, in the Indian Territory, on the seventh day of May, being the first Monday of that month, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-third.

Present: The Hon. Wm. H. H. Clayton, Judge of said court.

On Monday the seventh day of May, 1900, among the proceedings had were the following, to wit: —

W. C. Rogers, Plaintiff,

No. 2099. vs.

The Missouri, Kansas and Texas Railway Company, Defendant.

Now at this day come the parties to the above entitled and numbered cause and file stipulation showing that the case is finally settled, the plaintiff waiving and abandoning all claims for damages, each of the parties agreeing to pay its own court costs.

It is therefore adjudged that this case shall be dismissed, and that the parties plaintiff as well as defendant shall each pay the court costs incurred by them in the prosecution and defense of this case respectively.

The United States of America,
United States Court, Indian Territory, } ss.
Central District.

I, E. J. Fannin, clerk of the United States Court, within and for the Central District of the Indian Territory aforesaid, do hereby certify that the foregoing order is truly taken, and correctly copied from Court Journal 9, page of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at South McAlester this 7th day of May, A. D. 1900.

E. J. Fannin, Clerk.

## EXHIBIT F.

IN THE UNITED STATES COURT IN THE INDIAN TERRITORY AT SOUTH M'ALESTER IN THE CENTRAL DISTRICT.

W. C. Rogers,
Plaintiff,

No. 2099. vs.

Missouri, Kansas & Texas Railway Company,
Defendant.

Stipulation for Dismissal.

It is hereby stipulated and agreed by and between the parties to the above entitled and numbered cause that the said cause together with all matters involved therein be and hereby are fully and finally settled, and that this cause shall be at once finally dismissed each party to pay its own costs. The plaintiff waiving any and all claims for damages sued upon in this cause.

WILLIAM T. HUTCHINGS,
Atty. for Plaintiff.

CLIFFORD L. JACKSON,
Atty. for Defendant.

Indorsed: No. 2099. In the United States Court at South McAlester, Indian Territory, W. C. Rogers v. M. K. & T. Ry. Co. Stipulation for

Settlement, filed in open court, May 7th, 1900, E. J. Fannin, U. S. Clerk.

I hereby certify that the within is a true and correct copy of the original and indorsements thereon.

Witness my hand and seal this 7th day of May, 1900.

E. J. FANNIN, Clerk.

## EXHIBIT G.

COPY OF ORDER OF COURT.

United States of America,
Indian Territory — Northern District. } ss.

In the United States Court for the Northern District, Indian Territory, at a term thereof begun and held at Muskogee, in the Indian Territory, on the 4th day of December, A. D. 1899. Present, the Honorable John R. Thomas, Judge of said Court.

On April 2nd, 1900, the following order was made and entered of record, to wit: —

William L. Wilder,
vs.
M. K. & T. Ry. Co. } No. 1896.

Now comes the parties by their attorneys, and by agreement, it is ordered by the Court that this cause

be and the same is hereby dismissed as per stipulation this day filed, which is in words and figures as follows, to wit: —

In the United States Court in the Indian Territory, at Muskogee, in the Northern District.

William L. Wilder, Plaintiff,
No. 1896. vs.
Missouri, Kansas & Texas Railway Company, Defendant.

STIPULATION FOR DISMISSAL.

It is hereby stipulated and agreed by and between the parties to the above entitled and numbered cause that the said cause, together with all matters involved therein, be, and are hereby fully and finally settled, and that this cause shall at once be finally dismissed, each party to pay its own costs, the plaintiff waiving any and all claims for damages sued upon in this cause.

WILLIAM T. HUTCHINGS,
Atty. for Plaintiff.
CLIFFORD L. JACKSON,
Atty. for Defendant.

United States of America, Indian Territory, Northern District. } ss.

I, Chas. A. Davidson, clerk of the District Court for the Northern District of the Indian Territory, do hereby certify the foregoing to be a true copy of

an order made by said court on the 2nd day of April, 1900, as appears from the records of said court now on file in my office.

In witness whereof, I have hereunto set my hand, at my office in Muskogee, in said District, this 8th day of May, A. D. 1900.

CHAS. A. DAVIDSON, Clerk,
By L. A. WINSTON, D. C.

## EXHIBIT H.

### COPY OF ORDER OF COURT.

United States of America,
Indian Territory,
Central District. } ss.

In the United States Court in the Indian Territory, Central District, at a term thereof begun and held at South McAlester, in the Indian Territory, on the 15th day of January, 1900. Present, the Honorable Wm. H. H. Clayton, Judge of said court.

The following order was made and entered of record, to wit: —

Orange Fuller,
Assignee of Butler Bros.,
No. 794. vs.
Missouri, Kansas, and Texas
Railway Company, } Complaint at Law.

Now at this day comes the above named defend-

ant, and in support of the fourth amended petition for a new trial in this case files certified copy of opinion of the United States Court of Appeals for the Indian Territory, in the case of Missouri, Kansas & Texas Railway Company, Appellant, versus William L. Wilder, Appellee, and the court having fully considered the said amended petition for a new trial in this case, which was heretofore continued by agreement between counsel, to this the December, 1899, term of this court, together with the evidence thereon, and the briefs of counsel, filed both in support of and in opposition to said amended petition for new trial, and the court having been fully advised in the premises finds that the original petition for new trial was filed on the twentieth day of April, 1896, in accordance with Section 5155 of Mansfield's Digest of the Statutes of Arkansas, extended over the Indian Territory by Act of Congress, May 2, 1890, and that summons was duly issued and served upon the plaintiff as required by said statute, and that the said plaintiff has duly entered his appearance in these proceedings, and filed answer to the original petition for new trial, as well as to the different amendments thereto, as such amendments have been based upon such additional evidence as the defendant alleges was discovered subsequent to the filing of the original petition for new trial and amended petitions for new trial respectively, and the court further finds that the evidence fully sustains the said petition for new trial, and that under the statute hereinabove referred to, and in view of the opinion of the United States Court

of Appeals for the Indian Territory, in the case of the Missouri, Kansas & Texas Railway Company, Appellant, vs. William L. Wilder, Appellee, a companion case to this, that said petition should be sustained.

Wherefore the court orders that the said petition be sustained and a new trial granted.

United States of America,
Indian Territory,
Central District. } ss.

I, E. J. Fannin, Clerk of the District Court of the United States for the Central District of the Indian Territory, do hereby certify the foregoing to be a true copy of an order made by said Court on the 15th day of January, 1900, as appears from the records of said Court now on file in my office.

In testimony whereof, I have hereunto set my hand, at my office in South McAlester, in said District, this 28th day of April, A. D. 1900.

E. J. FANNIN,
Clerk.

By I. M. DODGE,
Deputy.